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829
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 143

KEARNEY-TRECKER EMPLOYEES LOCAL 1083, UAW-CIO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD AND KEARNEY & TRECKER CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Kearney-Trecker Employees Local 1083, U. A. W.-C. I. O., prays that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled case on the 26th day of February, 1954, wherein the said Court of Appeals dismissed the petition of the National Labor Relations Board for enforcement of an order issued by said Board on the 31st day of December, 1952, in which, after finding the Kearney & Trecker Corporation had engaged in unfair labor practice, the Board ordered certain affirmative action.

OPINION BELOW.

The opinion of the Court of Appeals for the Seventh Circuit appears at page 2 of the certified copy of the Record, filed herewith. It is reported in 210 Fed. (2d) 852.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on the 26th day of February, 1954. On the 12th day of March, 1954, petition for rehearing was filed by the petitioner herein. Said petition for rehearing was denied on the 5th day of April, 1954.

The jurisdiction of this Court is invoked under sections 8 (1) and 10 (f), Labor Management Relations Act of 1947, as amended.

In its opinion filed the 26th day of February, 1954, the United States Court of Appeals for the Seventh Circuit held that the election held by the National Labor Relations Board for the purpose of determining the bargaining representative desired by the employees was held in an atmosphere that precluded a free choice by the employees of the representative they desired.

QUESTION PRESENTED.

Did the Circuit Court of Appeals, by basing its decree upon its own opinion on issues raised by an internal union controversy relating to title to property never litigated and pending in two actions in the Circuit Court of Milwaukee County in the State of Wisconsin, exceed its authority on review of the action of the National Labor Relations Board in a representation case by substituting its judgment for the judgment of the Board?

SPECIFICATION OF ERRORS TO BE URGED.

The United States Court of Appeals for the Seventh Circuit erred:

(1) In grounding its decision and order on its own opinion of wholly unlitigated issues in an internal union controversy which were pending in the state courts of Wisconsin.

(2) In holding that it was the duty of the National Labor Relations Board to hear and determine the issues involved in an internal union controversy.

(3) In holding that it was the duty of the National Labor Relations Board to determine title to the funds and other property of the employees union at the Kearney & Trecker Corporation plant.

(4) In holding that it was the duty of the National Labor Relations Board to determine the legality and the effect of a claimed disaffiliation from an international union and the affiliation with another international union.

(5) In holding that though the Board made no finding whatever upon the issues involved in the internal union controversy and upon the wholly unlitigated issues, that the court should substitute its judgment on the issues involved and base its decree upon such substitution.

(6) In resolving the wholly unlitigated issues of an internal union controversy to the extent of excluding the Board from any discretion whatever in the matter and entering a decree instead of remanding the case back to the Board for further action.

(7) In holding that the unlitigated issues of an internal union controversy were material to the sole issue before the Board in the representation proceedings.

REASONS FOR GRANTING WRIT.

(1) That the opinion and decree of the United States Court of Appeals for the Seventh Circuit is in conflict with the decisions of this Court in *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U. S. 206, 226; *Southern Steamship Co.* v. *National Labor Relations Board et al.*, 316 U. S. 31, 37; *National Labor Relations Board* v. *Falk Corp.*, 308 U. S. 453, 458; *Amalgamated Workers* v. *Edison Co.*, 309 U. S. 261, 264; and *National Labor Relations Board* v. *Tower Co.*, 329 U. S. 324, 333.

(2) That the decision and decree of the Court of Appeals for the Seventh Circuit is in conflict with the decision of the Court of Appeals, Fifth Circuit, *National Labor Relations Board* v. *Whittier Mills Co.*, 111 F. (2d) 474, 477; the Court of Appeals, Fourth Circuit, *National Labor Relations Board* v. *National Plastic Products Co.*, 175 F. (2d) 755, 759; the Court of Appeals, Sixth Circuit, *National Labor Relations Board* v. *H. S. Kress & Co.*, 194 F. (2d) 444, 446; and Court of Appeals, Second Circuit, *National Labor Relations Board* v. *Moyer & Pratt, Inc.*, 208 F. (2d) 624, 625.

(3) That the decision and decree of the Court of Appeals, Seventh Circuit, is in conflict with the long-established practice of the National Labor Relations Board. *Bowen Products Corp. and International Union U. A. W.-C. I. O.*, 89 N. L. R. B. 235; *Boston Machine Works Co. and Local 257, International Union*, 89 N. L. R. B. 61; and *Brightwater Paper Co. and United Mine Workers*, 54 N. L. R. B. 1106.

(4) The opinion and decree of the United States Court of Appeals for the Seventh Circuit which, in effect, holds that the National Labor Relations Board in a representation hearing must hear and determine issues including title to property involved in an internal union controversy, is

fraught with such potential mischief that it can reasonably cause the complete frustration of the policy of the Labor Management Act in the free choice of bargaining representatives.

(5) That if such ruling is permitted to stand, it would be almost impossible for the National Labor Relations Board to ever effectuate the policies of the Act as it relates to representation of employees in bargaining relations.

(6) That all that would be necessary to completely and fully render any action the Board might take futile would be for a small or large group of dissident members of a labor union to raise claims to title and custody to the property of a union.

(7) That the Board could not, if the ruling of the Court of Appeals for the Seventh Circuit remains unreversed, ever order any representation election unless and until it decided adverse claims of dissident groups in a union to the title and custody of the property of the union.

(8) That any decision made by the Board as to the title and custody of the property of the union would not be *res adjudicata* as to the adverse claims and could very well in a state court having entire jurisdiction of all the issues result in an entirely contrary judgment.

(9) To permit the decision and order of the Court of Appeals for the Seventh Circuit to stand, based on its assumed authority to determine how wholly unlitigated issues should be resolved, would cause utter confusion in countless representation proceedings.

(10) That if the decision and decree of the Court of Appeals for the Seventh Circuit is to stand as the law of the land, it will mean that all representation cases will be subject to review by the Court of Appeals as if they were tried in the first instance in that court, which would be tantamount to a trial *de novo*.

(11) That if the decision and decree of the Court of Appeals for the Seventh Circuit is to become the law of the land, all that would be necessary to completely frustrate any attempt of the employees of any employer as to their choice as to bargaining representative would be for a small group of dissident employees, or an international union, or an employer to raise issues, either real or fantastic, in any representation hearing and compel the Board to litigate and resolve such issues.

(12) That even if the Board did litigate and resolve such issues they could again be reviewed and litigated in the Court of Appeals.

(13) The decision and decree of the Court of Appeals for the Seventh District makes mandatory the determination of property rights to union's assets by the Board prior to the Board's conducting an election in a representation proceeding. Such precedent must result obviously in a conflict between the state and federal courts in respect to the determination of property rights to union's assets in the event of affiliation or disaffiliation.

(14) Added importance to the determination of this question by the Supreme Court stems from the fact that there are now before the Board certain cases involving the same issues. In these cases the local unions have seceded from the international unions and the question of the right and title to the property and assets is in issue. These cases involve such unions as the United Electrical Workers of America and the International Fur & Leather Workers of America. *Lawrence Leather Co.*, 108 N. L. R. B. No. 88; *International Harvester Co.*, 108 N. L. R. B. No. 91.

STATEMENT.

Very briefly the events leading up to the present situation are as follows:

In 1945 the National Labor Relations Board certified the Employees Independent Union, hereafter called the E. I. U., as representative of approximately 1500 employees of the Kearney & Trecker Corporation. At that time the E. I. U. was affiliated with the Confederated Unions of America, hereafter called the C. U. A.

At a regular meeting of the E. I. U. on September 10, 1950, the motion was made and carried that the E. I. U. disaffiliate from the C. U. A. Thereafter, the charter of the E. I. U. was returned to the C. U. A. with a notice of disaffiliation.

On November 5, 1950, at a regular meeting of the E. I. U. membership, it was voted to invite representatives of various international unions to speak at an open union meeting for the purpose of permitting the membership to determine whether they wish to affiliate with any of them. On December 17th such meeting was held and representatives of four international unions spoke.

At a meeting on January 7, 1951, a motion was made and carried to hold another special meeting for the purpose of hearing more fully from representatives of the UAW CIO and the UAW A. F. of L. and of deciding on affiliation. This meeting was held on January 21, 1951.

Following talks by representatives of the two international unions invited to the meeting, a secret ballot was taken to determine with which international union, if either, the E. I. U. should affiliate. Out of 99 persons present, 68 voted for the UAW CIO, 28 for the UAW A. F. of L. and 3 for the E. I. U.

Following the decision made at the January 21st meeting, the officers of E. I. U. applied for and received on March 4, 1951, the charter from the UAW CIO as Local 1083.

On March 20th notice was given to the Company that all deductions for union dues from wages should be delivered to the Treasurer of Local 1083.

On February 8, 1951, the Company refused to continue bargaining relations and to permit an international representative of UAW CIO to participate.

On March 9, 1951, the Company wrote the President of Local 1083 that it (the Company) was confronted with conflicting claims of the UAW CIO, the C. U. A. and members of the Independent Union, and that until a decision of the proper tribunal as to what the situation really was, they were not in a position to meet and bargain.

Certain members of the E. I. U., not interested in affiliation with the UAW CIO, asserted that all of the steps taken by the officers of the E. I. U. to affiliate with the UAW CIO were illegal and of no effect.

On the 4th day of April, 1951, your petitioner petitioned the National Labor Relations Board for a representative election based on the ground that there was an unresolved doubt as to who the employees of the Kearney & Trecker Corporation desired as their bargaining representative. That there was a schism among the employees of the Kearney & Trecker Corporation which had completely disrupted the bargaining relations between the employees and the employer.

That on the 8th day of May, 1951, the National Labor Relations Board held a hearing at Milwaukee, Wisconsin, to determine whether such election should be ordered. That all of the interested parties were present at said hearing. That after a full and complete hearing, upon

which testimony was adduced and all interested parties having stated their position, the Board on the 14th day of August, 1951, ordered an election to be held among the employees of the Kearney & Trecker Corporation to determine the bargaining agent desired by said employees.

In the hearing on Local 1083's petition for representation election, the Company contended that no election should be ordered because: (1) the existence of the unexpired contract of July 2, 1950, barred an election; and (2) "that it would be inequitable to hold an election while 1083 is still holding funds belonging to the E. I. U."

That on the 12th day of September, 1951, said election was held and your petitioner received the majority of votes cast in said election and was thereafter on the 31st day of October, 1951, certified by the National Labor Relations Board as the exclusive bargaining agent for the employees of the Kearney & Trecker Corporation. That the Kearney & Trecker Corporation refused to bargain collectively with your petitioner, the certified exclusive bargaining agent of its employees.

That on the 16th day of November, 1951, your petitioner complained to the National Labor Relations Board that the Kearney & Trecker Corporation was engaging in "unfair labor practice" by refusing to engage in collective bargaining negotiations with the certified exclusive bargaining representative.

That on the 4th day of December, 1951, the National Labor Relations Board issued a complaint charging the said Kearney & Trecker Corporation with engaging in unfair labor practices by refusing to bargain collectively with its certified bargaining representative.

On the 21st day of January, 1952, at Milwaukee, Wisconsin, a full and complete hearing on the complaint was held, at which all interested parties were present and took part in said proceeding. That your petitioner, the charg-

ing party, was duly permitted to intervene in said proceeding and took an active part therein.

That on the 31st day of December, 1952, the National Labor Relations Board issued its decision and order in said proceeding finding the Kearney & Trecker Corporation guilty of engaging in unfair labor practices by refusing to bargain with the certified exclusive bargaining agent of its employees and ordering said Kearney & Trecker Corporation to cease and desist from such practice and ordering it to take certain affirmative action.

Thereafter the Kearney & Trecker Corporation petitioned the United States Court of Appeals for the Seventh Circuit for a review of the decision and order of the National Labor Relations Board entered on the 31st day of December, 1952.

That on the 26th day of February, 1954, the United States Court of Appeals for the Seventh Circuit refused to enforce the Board's order and entered a decree dismissing the petition.

That on the 12th day of March, 1954, your petitioner, as the aggrieved party in the action, petitioned the United States Court of Appeals for the Seventh Circuit for a rehearing of its decision and order. That on the 5th day of April, 1954, the United States Court of Appeals for the Seventh Circuit denied the petition.

That the denial of the Court to enforce the order of the National Labor Relations Board entered on December 31, 1952, places the petitioner in exactly the same position as if the decision and order of the Board were adverse to the petitioner in the first instance; and it is thereby aggrieved in exactly the same manner as if the Board had originally dismissed the unfair labor charge complaint, thus bringing the petitioner under the provisions of Section 10 (f) of the Labor Management Act of 1947, as amended.

ARGUMENT

The petitioner was the charging party in the National Labor Relations Board case No. 13-CA-971, in which the order involved herein was issued; that with the permission of the Court of Appeals, Seventh Circuit, it filed a brief in the above entitled case, which was received by and noticed in its opinion by the Court; that it is the bargaining representative, certified by the National Labor Relations Board, for the production and maintenance employees of the Kearney & Trecker Corporation and is aggrieved by the decision of the U. S. Court of Appeals, Seventh Circuit, and its impact upon the Board's order of December 31, 1952.

The Real Parties in Interest.

We respectfully submit that the U. S. Court of Appeals, Seventh Circuit, in its decision completely ignores the real parties in interest.

The real parties in interest are *not* the Kearney & Trecker Corporation, nor Local 1083, nor the Employees Independent Union, nor the National Labor Relations Board, but are the *employees* of the Kearney & Trecker Corporation, whose absolute right to the benefits of collective bargaining have been denied for a period of over three years.

This right to collective bargaining is paramount to, and should not be denied, by differences between or claims of Local 1083, Kearney & Trecker Corporation or Employees Independent Union to the title of property.

The National Labor Relations Board clearly recognized that this right was paramount in its order for the election held on September 12, 1951.

This order was to effectuate the policies of the National Labor Relations Act of 1947, by restoring collective bargaining rights to the employees of the Kearney & Trecker Corporation.

The only issue involved in Case No. 13-RC-1900 was: Was there an unresolved doubt as to the identity of the bargaining representative desired by the employees of the Kearney & Trecker Corporation?

The Board found as a fact that there was such an unresolved doubt. There is not one bit of evidence anywhere in the record that even tends to refute that finding.

The positive evidence in the record supporting that finding is overwhelming.

The Employer, in its letter of March 9th, 1951 (Ex. 7) (Pet. Appx. 37) clearly states this doubt and that it was so serious that the bargaining negotiations were wholly suspended.

This was the situation that confronted the Board on May 8th, 1951, when the representation hearing opened (Case 13-RC-1900).

The paramount interests involved in that hearing were the rights of the employees of the Kearney & Trecker Corporation to the benefits of collective bargaining.

Not Local 1083; not the Employees Independent Union; not the Kearney & Trecker Corporation.

The absolute duty of the Board was to resolve that doubt and to take such action that would affectuate the policies of the National Labor Relations Act.

And that doubt could be resolved only by giving all the employees of the Kearney & Trecker Corporation the opportunity to express their choice as to whom *they* desired as *their* bargaining agent.

The election was ordered, held, and the choice of the employees clearly and definitely expressed and established.

We respectfully submit that the only matter before the Board at the representation hearing was the unresolved doubt that had thrown collective bargaining relations into confusion.

Whether there was one union or two unions seeking recognition as the bargaining representative was, and is, wholly immaterial to the real issue involved—that was the restoration of collective bargaining at the Kearney & Trecker plant.

After the Board had determined from the record that an election was necessary to resolve the doubt, it was the absolute duty of the Board to see that any person or any group of persons claiming recognition, and showing evidence of a sufficient interest, was placed upon the ballot to be voted on by all the employees.

Evidently the group of employees calling themselves Local 1083, and the group calling themselves Employees Independent Union, each in the opinion of the Board had shown sufficient interest to entitle them to a place on the ballot.

And this was indubitably true, whether there was one union or two unions.

Kearney & Trecker Employees Local 1083 made no attempt before the Board, at either hearing, to litigate the question of affiliation or disaffiliation, nor to litigate the question of control of the property of the union.

It was wholly immaterial to the real issue before the Board, *i.e.*, the confusion of the collective bargaining involving all the employees of the Kearney & Trecker Corporation.

This entire matter, involving the legality of the disaffiliation and affiliation, the right to control the property, the Commissary management and control, are all at issue,

and pending in the Circuit Court of Milwaukee County, State of Wisconsin.

These issues, which are purely internal union matters, will be determined by a court of equity, in a regular and orderly manner, and a decree entered, based on all the evidence material to the issues.

In its opinion and decision on the Board's petition for enforcement of its order, the U. S. Court of Appeals, Seventh Circuit, states, at page 8 of the printed copy:

> "* * * With that litigation we need not be concerned and certainly we do not intend to prejudge it * * *."

We respectfully submit that that is exactly what the Court has done.

We sincerely believe that the real problem is the protection of the right of *all the employees* to be able to bargain collectively for their working conditions. This right has been denied them for over three years.

It matters not who, or what, is responsible for this condition. This right of the employees is paramount to any other consideration.

The National Labor Relations Board, after full hearing and careful consideration, took what it, as an expert in the field, deemed the best way to effectuate the policies of the National Labor Relations Act.

And in taking such action it very properly and wisely, in its effort to protect the rights of all employees, left the internal union squabble to be resolved by the competent judicial tribunal that had already taken jurisdiction to do so.

Collective bargaining for conditions of employment would be restored to the employees of the Kearney & Trecker Corporation, and the policies of the National Labor Relations Act would be effectuated and all of the

present confusion would be removed if the Board's order was reinstated.

The Circuit Court of Milwaukee County will, after a complete trial, resolve the conflicting claims to the property of all of the parties.

In the meantime, the employees of the Kearney & Trecker Corporation should not be denied their absolute right to bargain collectively through representatives of their own choice.

Petitioner believes this to be a case wherein a writ of certiorari should be granted.

Respectfully submitted,

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No. 143

KEARNEY-TRECKER EMPLOYEES LOCAL 1083, U. A. W.-C. I. O., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND KEARNEY & TRECKER CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court below (Co. A. 125-136) [1] is reported at 210 F. 2d 852. The findings of fact, conclusions of law and order of the National Labor

[1] The printed record before this Court consists of two separately paginated volumes: the appendix to the Company's brief in the court below, herein designated "Co. A." and the appendix to the Board's brief in the court below, designated "B.A."

Relations Board (Co. A. 267-272) are reported in 101 NLRB 1577.

JURISDICTION

The judgment of the court below was entered on February 26, 1954 (Co. A 125). On application of the Solicitor General the time for filing a petition for certiorari was extended, by order of Mr. Justice Reed, to June 16, 1954. The petition was filed on June 16, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254, and Section 10(e) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

A representation election was conducted between two factions which had evolved out of a schism within a union. The election was won by the faction which, under a claim of successorship to the union, had appropriated the union assets. Upon these facts the petition seeks review of the following questions:

1. Whether the Board could sustain the validity of the election only after determining that the victorious faction had properly asserted title over the assets.

2. Whether, in the absence of a showing that the Board acted arbitrarily or capriciously, the court below could properly overturn the Board's judgment that the campaign tactics of the victorious faction did not prevent the exercise of a free choice by the employees so as to require the setting aside of the election.

We discuss *infra*, pp. 12-17, whether these questions are in fact presented by the decision of the court below.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*), are set forth in the Appendix, *infra*, pp. 18-21.

STATEMENT

1. The Board's findings of fact

Since its certification by the Board in 1945, and prior to the events in this case, the Employees Independent Union, hereafter called the E. I. U., was recognized by Kearney & Trecker Corporation, hereafter called the Company, as representative of its approximately 1,500 employees (Co. A. 79; 106, 353, B. A. 8-9). Following bargaining negotiations during the spring of 1950, the E. I. U. and the Company executed a collective bargaining agreement on July 2, 1950, for a term of two years, with a provision for reopening wage rates after the end of the first year (Co. A. 79; 1-21).

Thereafter, at a regular meeting of the E. I. U. on September 10, 1950, a motion was made and carried that the E. I. U. disaffiliate from its parent organization, the Confederated Unions of America (Co. A. 79-80; 24, 116, 118, 126). In accordance with this action, the officers of E. I. U. returned its charter to the Confederated Unions of America with a notification of the disaffiliation decision, but continued to function under the same name (E. I. U.) during the ensuing period in which it was

unaffiliated with any parent organization (Co. A. 80; 187-188, B. A. 91-93, 112). However, at a meeting on January 21, 1951, called for the purpose of determining with which international union, if any, E. I. U. should affiliate, the membership voted to affiliate with the UAW-CIO (Co. A. 80; B. A. 20-21, 29-30, 105, 106, 140).[2]

Following the decision made at the January 21 meeting, E. I. U. applied for a charter from the U. A. W.-C. I. O., and on March 4, 1951, this charter was received and accepted by vote of the membership at a regular union meeting (Co. A. 81; B. A. 36-37, 107-108). The organization thus chartered was designated Local 1083. The principal officers of the E. I. U., who had been elected in the fall of 1950 after the E. I. U. had disaffiliated from the Confederated Unions of America, continued in the same offices in Local 1083 without any new election (Co. A. 81; 139, 143, B. A. 75). Immediately following the formal organization of Local 1083, its officers took steps to align the operations of their union with its new status. Thus, on March 5, 1951, the lock on the door of the union's office was changed, and a formal transfer was made to Local

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[2] Of the 99 persons present, 68 voted for the U.A.W.-C.I.O., 28 for the U.A.W.-A.F.L., and 3 for the E.I.U. (Co. A. 80; B.A. 29-30, 140). The attendance at this meeting was larger than had been normal for E.I.U. meetings during the immediate preceding period. Thus, although there were about 600 members in the E.I.U. during the autumn of 1950, the usual attendance at union meetings was about 45 to 50 (Co. A. 125, B.A. 19). Under the E.I.U.'s by-laws in effect at the time a quorum consisted of 25 members (B.A. 113).

1083 of all assets which had belonged to E. I. U. (Co. A. 82; 131-132, 144-146, 165-166).

Consistent with its claim of successorship, Local 1083 notified the Company that all deductions of union dues should be delivered to the treasurer of Local 1083 (Co. A. 84; 49). And on May 6, 1951, Local 1083 stated in a document entitled "Report to the Membership" and distributed among the Company's employees that (Co. A. 213):

> Only paid up members in Local 1083 are getting sick and death benefits, so be certain that you do not become delinquent. MEMBERS ON CHECK-OFF that have signed the pledge petition are considered in good standing, even though the Company is holding up your dues . . .
>
> Those not on Check-off—get your old union membership card to your steward and have him exchange your old card for your new Local 1083 card, NO CHARGE.

After the meeting of January 21, 1951, when the membership of the E.I.U. had voted to affiliate with the U. A. W.-C. I. O., a group of employees who had opposed both that step and the disaffiliation action in September 1950, undertook to re-activate the E. I. U. In March 1951, one of this group initiated proceedings in a Wisconsin state court to contest Local 1083's appropriation of properties that had belonged to the E. I. U. (Co. A. 342, 348, B. A. 35-36, 115). Thereafter at meetings held during the same month at the instance of the president

of the Confederated Unions of America, temporary officers were named to carry on as the original E. I. U. (Co. A. 83; 38-41, 170, B. A. 81), and finally, on April 8, 1954, permanent officers were elected (Co. A. 83; 46-49).

The Company was notified of these events by the attorney for the group, and on March 13, temporary officers of the E. I. U. met with the Company to the end that the E. I. U. might be recognized as the proper bargaining representative (Co. A. 50, 356-357). In the meantime, during the period following the disaffiliation meeting in September 1950, and on four occasions after the affiliation with the U. A. W.-C. I. O. in January 1951, the Company had continued to recognize and negotiate with the established bargaining committee whose allegiance, following the disaffiliation action of September 25, was openly pledged to the E. I. U. as an unaffiliated union, and after January 21, to Local 1083 (Co. A. 81; 95, 105-106, 355-356, B. A. 27-28, 287). On March 9, however, the Company broke off negotiations on the ground that it was "confronted with conflicting claims," and expressed the hope "that the parties who are making conflicting claims will have this matter resolved at the earliest possible moment" (Co. A. 82; 37). However, on March 30, the Company recognized the E. I. U. as representative of its employees, and renewed bargaining discussions with that union (Co. A. 83; 100). As a result of these negotiations a supplemental agreement was executed on April 30, 1951, modifying various provisions of the 1950 contract and extend-

ing the duration of that contract until July 2, 1954 (Co. A. 83-84; 103, 107).

Local 1083, in the meantime, sought formally to establish itself as the employees' bargaining representative, first through petitioning the Board to amend the certification issued in 1945 by which the E. I. U. had been named bargaining representative, and to substitute the name "Local 1083" for the E. I. U. on the ground that the latter organization had so changed its name (Co. A. 82; 34-35). The Board denied this petition, however, "for the reason that over six years have elapsed since the issuance of the certification herein," but the Board added that its action was "without prejudice to the right to file a new petition for certification of representatives" (Co. A. 83; 36). Accordingly, on April 4, 1951, Local 1083 filed a petition with the Board for an election (Co. A. 83; 43-46).

Following a hearing on Local 1083's petition, the Board issued its Decision and Direction of Election ordering an election among the Company's employees to determine their choice of representatives (Co. A. 78-86). On the day before the election Local 1083 circulated among the employees a campaign newspaper carrying an article which purported to give "the complete text of the N. L. R. B. decision" ordering that an election be held. The decision was further described as "expos[ing] all the lies and subterfuges released by those company-minded persons who oppose your having a Union free from Company domination" and as "prov-[ing] E. I. U., Company Collusion, Chicanery"

(Co. A. 64-65). The report omitted one paragraph of the decision in which the Board had rejected the E. I. U.'s contention that "it would be inequitable to hold an election while Local 1083 is still holding funds belonging to the E. I. U." and had observed that "the question of the ownership of these funds is now pending before the courts" (Co. A. 65-66, see p. 85).

The election was held on September 12, 1951. Of 1,379 ballots cast, 752 favored Local 1083, while 588 were for the E. I. U. (Co. A. 228-229). In accordance with these results, Local 1083 was certified by the Board as the bargaining representative of the Company's employees (Co. A. 87-90). The Company, however, refused to honor the certification, and simultaneously withdrew recognition from E. I. U. in order, as it explained to its employees, "to obtain a complete review of the entire case before a United States Court" (B. A. 121). Local 1083 thereupon filed a charge with the Board alleging that the Company's refusal to honor the certification and recognize it as the employees' bargaining representative constituted a violation of Section 8(a)(1) and (5) of the Act, and the present case was initiated.

2. The Board's Conclusions and Order

In sum, the Board concluded that the representation election was properly directed, that the conditions under which it was conducted permitted a free choice by the Company's employees, that the certification of Local 1083 as their bargaining represen-

tative was valid, and, therefore, that the Company's refusal to honor the certification constituted an unfair labor practice. In reaching these determinations, the Board rejected a variety of contentions directed to the invalidity of the representation proceeding which were advanced by the Company. Of these contentions only three are germane to the questions presented here. Thus, the Company asserted that "it would be inequitable to hold an election while Local 1083 is still holding funds belonging to the E. I. U." (Co. A. 85); that Local 1083's announcement that only its members were eligible to obtain benefits from union assets had a coercive and improper effect upon the balloting (Co. A. 240); and that Local 1083 had abused the Board's process in circulating immediately prior to the election an incomplete, and therefore misleading, version of the Board's Decision and Direction of Election (Co. A. 64-65). As to the first of these, which was raised at the hearing in the representation case and reiterated in the unfair labor practice case, the Board observed that "the question of the ownership of [union] funds [was then] pending before the courts," and concluded that the election should not "be delayed pending its determination" (Co. A. 85). In rejecting the second contention, which was raised for the first time in the unfair labor practice case, the Board affirmed the Trial Examiner's ruling that Local 1083's announcement relating to union benefits, made in May was "too remote in point of time to have had a coercive effect on the election [held in September]"

(Co. A. 240). The Trial Examiner also pointed out that no mention of this occurrence had been made during the election proceedings, at which time both E. I. U. members and the Company's supervisors were alerted to report any coercive incidents with respect to the election campaign (Co. A. 239-240). Moreover, the Examiner noted that the E. I. U. had ample opportunity to present its counter-propaganda to the employees, and in fact "assured its members that it would pay the benefit if it could not obtain them from Local 1083, and thereafter did so" (Co. A. 239). As to the third objection, the Board concluded that the statements of Local 1083 with respect to the Board's findings in its Decision and Direction of Election did not, regardless of their truth or falsity, go beyond the bounds of legitimate union campaigning (Co. A. 88-89).

3. The decision of the court below

The court below set aside the order of the Board (B. A. 136). Although recognizing that the Board had discretion to hold an election during the existence of a collective bargaining contract where, as here, an organizational schism had occurred among the employees, the court held (B. A. 132-134) that Local 1083's conduct in asserting control over union assets and announcing that only its members were eligible to benefit therefrom was improper and had a coercive impact which prevented the employees from exercising a free choice at the polls, thereby invalidating the election results and the

certification issued on the basis thereof. The court recognized the question of ownership of union property had been placed in litigation in a Wisconsin state court, and stated that it did "not intend to prejudge [that case]" (B. A. 133). The court did not consider, however, that this factor prevented it from determining "what effect, if any, the . . . possession, control and use by Local 1083 [of union property] was reasonably calculated to have upon an election" (B. A. 133). Upon this question, the court ruled that Local 1083 was entitled to possession of union funds and to serve notice that its members exclusively might benefit from them only if it were a successor to E. I. U. However, the court concluded from the evidence relating to the schismatic movement that Local 1083 was not a successor, and that the E. I. U. therefore remained the owner of all union property. Viewed in this light, the conduct of Local 1083, in the court's opinion, "was coercion, open, direct, and no doubt effective" (B. A. 134). The court also concluded (B. A. 135-136) that Local 1083, by reprinting and distributing among the employees an incomplete text of the Board's Decision and Direction of Election in this case, had engaged in conduct which, while not warranting the election results to be set aside when considered alone, nevertheless "was improper and when considered in connection with the situation [pertaining to possession of union assets] . . . , could well have affected the result of the election" (B. A. 135).

DISCUSSION

This case involves a typical situation where rival factions have evolved out of a schism within an established bargaining representative, each vying for the employees' support, and each making claims of successorship and title to the assets of the established union. In determining the employees' choice of representatives between the rival factions in that situation, the Board has established the rule that it "will not pass upon the legal validity of the disaffiliation action or the property rights * * * of the parties." N. L. R. B., *Sixteenth Annual Report* (1951, p. 72). In the Board's view, the legality of the disaffiliation, or of the successorship claims pursuant thereto, is immaterial in such cases. The important factor, as in the instant case, is that "two rival labor organizations have evolved [out of the one] each claiming to represent the Company's [employees]" (*Pacific Lumber Inspection Bureau, Inc.*, 7 N. L. R. B. 529, 531), and the normal bargaining relationship between the employer and the employees should be clarified and restored in order to promote stability in industrial relations. In such a situation the Board deems it imperative to resolve the conflicting claims to representation by affording the employees an opportunity to express their preference between the rival groups in a representation election. Resolution of such questions has never been made to turn, however, upon an inquiry into the private property rights or the legal merits of successorship claims of the parties. In the Board's view, "So far as the property rights

of the parties are concerned, that is a matter properly for the courts rather than this Board to decide." *Boston Machine Works Co.*, 89 N. L. R. B. 59, 61. See also *Prudential Insurance Company*, 106 N. L. R. B. No. 55, n. 6; *American Radiator and Standard Sanitary Corporation*, 93 N. L. R. B. 7, 8-9; *Bowen Products Corporation*, 89 N.L.R.B. 235, 237; *Brightwater Paper Company*, 54 N. L. R. B. 1102, 1106.[3]

In this case the parties attempted to follow this Board-approved course of leaving the "property" issues to the State courts while bringing the "representation" issue to the Board. Local 1083's claim to union assets was challenged by the E. I. U. in a Wisconsin court in a suit which was pending at the time of the proceedings before the Board and the court below and, indeed, is still pending. The single purpose of the representation case, as it was conceived by all the parties and litigated before the Board, was to settle the question of representation.[4]

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[3] Consistent with the Board's view, both state and federal courts have traditionally entertained suits to adjudicate property rights in schism situations. Illustrative of the many cases in this field is *John Hancock Mut. Life Ins. Co.* v. *United Office & Professional Workers*, 93 F. Supp. 296 (D. N.J.). As the court there notes, "the basic determinations involved require recourse only to the laws of the state," and not to the National Labor Relations Act. 93 F. Supp. 305.

[4] Evidence relating to the organizational schism in this case was introduced only for the purpose of showing whether it had caused "such confusion in the bargaining relationship that the contract (between respondent and the E.I.U.) can no longer be said to promote stability in labor relations" (Co. A. 84). Absent such a showing, the contract under Board rules would have barred an election, notwithstanding a loss of majority support among the employees by the E.I.U.

In both the representation and unfair labor practice phases of this case the Board followed the above-stated principle by deciding only the representation issue and not the conflicting property claims. The petition for certiorari asserts (Pet. 2, 3, 14) that the court below in its decision rejected this principle by holding that the election was unfair because Local 1083 held union assets for the benefit of its members which it did not own. The court's decision, as petitioner reads it, turns on a question of title and its effect is to require the Board to resolve the question of title. Petitioner further contends that the court below erred in applying the "substantial evidence" test to the Board's determination of representation issues which properly rest within the Board's administrative discretion, and are not to be set aside unless arbitrary or capricious. The court did not intimate that the Board acted arbitrarily or capriciously in ruling that Local 1083's assertion of control over union assets was not, in any event, of such a character as to preclude a free election; indeed, the circumstances relied on by the Board in concluding that the election results should not be set aside (*supra*, pp. 9-10) plainly show that they are not "without justification in law or in reason." *National Labor Relations Board* v. *A. J. Tower Co.*, 329 U. S. 324, 332.

The Board agrees that the questions stated in the petition are important in the administration of the Act. The Board has consistently held that its function in representation cases is limited to the conduct of investigations and, where appropriate, elections,

and that it does not determine the property and successorship claims that are often made in such cases. If the decision below requires the Board to change its view, the Board is likely to find itself in frequent conflict with local courts exercising their traditional jurisdiction over such matters. For internecine struggles for ascendency by groups within labor organizations are common, and are normally accomplished by applications to the Board to settle, by election, representation rights.[5]

Similarly, if the decision below means that the court of appeals regards the scope of judicial review of Board findings of fact in representation cases as being as broad as in unfair labor practice cases, such a holding would conflict with decisions of this Court and of the courts of appeals. See *National Labor Relations Board* v. *A. J. Tower Co.*, 329 U. S. 324, 330; *Southern Steamship Co.* v. *National Labor Relations Board*, 316 U. S. 31, 37; *National Labor Relations Board* v. *Waterman S. S. Corp.*, 309

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[5] See Samoff and Summers, *Disaffiliation*, 1 Labor Law Journal 585 (May 1950). The expulsion in 1949 by the CIO of several of its member internationals and the attempt by that body to organize the members of those organizations into unions chartered by it presented the Board with a great number of representation cases involving the same issues as those in this case. Fifteenth Annual Report of the Board (1950), 63-64. Representation cases involving schismatic movements traceable to those expulsions continue to come before the Board. See, e.g., *A. C. Lawrence Leather Company*, 108 NLRB No. 88. Similar cases and issues arise from a great variety of circumstances, other than expulsion by a parent federation, on which employees divide within a union. See, e.g., *Columbian Rope Co.*, 88 NLRB 1448; *Brenizer Trucking Co.*, 44 NLRB 810.

U. S. 206, 226; *National Labor Relations Board* v. *Falk Corp.*, 308 U. S. 453, 458.[6]

It is not clear, however, that the questions stated in the petition for certiorari are presented by the decision of the court below. Thus, the court's holding with respect to the question of successorship and ownership of union property may be susceptible of being interpreted not to turn upon Local 1083's entitlement to union assets, but upon its coercive utilization of such assets to influence the election results, regardless of the question of their ownership. Similarly, in view of the court's silence with respect to the standard of review it applied to the Board's decision, it is not clear that the court disregarded the proper weight which must be attached to the Board's findings in election cases.

In view of these doubts as to the scope and implications of the decision below, the Government did not file a petition for certiorari. If, however,

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[6] Under the 1947 amendments to the Act, as under the Wagner Act, courts of appeals have repeatedly recognized that their review of Board determinations respecting the adequacy of safeguards necessary to a fair and free choice of bargaining representative was not controlled by the substantial evidence test, but rather by the extensive administrative discretion vested in the Board in such matters. See, e.g., *National Labor Relations Board* v. *National Container Corp.*, 211 F. 2d 525, 532 (C.A. 2); *National Labor Relations Board* v. *Moyer & Pratt*, 208 F. 2d 624, 625-626 (C.A. 2); *National Labor Relations Board* v. *Wilkening Mfg. Co.*, 207 F. 2d 98 (C.A. 3); *National Labor Relations Board* v. *Whitinsville Spinning Ring Co.*, 199 F. 2d 585, 587 (C.A. 1); *National Labor Relations Board* v. *S. H. Kress & Co.*, 194 F. 2d 444, 446 (C.A. 6); *National Labor Relations Board* v. *National Plastic Products Co.*, 175 F. 2d 755, 758 (C.A. 4).

the Court should consider that the case sufficiently presents the questions discussed above, the questions are of such a nature and importance as to warrant review.[7]

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.

GEORGE J. BOTT,
General Counsel,
National Labor Relations Board.

JULY 1954.

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[7] There is some question as to the standing of petitioner to petition for a writ of certiorari. The facts relating to this point may be summarized as follows: After the Company petitioned the court below to review the Board's order herein, Local 1083, which had filed the charges initiating the proceedings before the Board, filed its motion "for leave to intervene * * * for the purpose of filing briefs now on deposit with the Clerk of this court, and for permission to argue said cause." The Board in a communication to counsel for Local 1083, a copy of which was sent to the court below, stated that it "does not object to your motion to intervene, provided that the Board will not be required to yield any of its time upon argument." The Company opposed the motion. Thereafter, the court below granted the motion of Local 1083 to intervene "for the purpose of filing the Briefs now on deposit" but denied "that part of said motion which seeks leave to said counsel to participate in oral argument of this cause." After the court below issued its decision Local 1083 filed its petition for rehearing (B.A. 139-149) which the court below denied on April 5, 1954, without opinion (B.A. 155).

Thereafter, on May 27, 1954, the then Acting Solicitor General applied for an extension of time within which to file a

[Footnote 7 Continued on page 18]

[Footnote 7 Continued from page 17]

petition for certiorari. This application, which was granted by Mr. Justice Reed on that date, was made in order to afford Local 1083 an opportunity to present its reasons for believing that the Solicitor General should reverse his prior determination not to file a petition for certiorari in this case. It was stated in the application, perhaps mistakenly, that the Union, "although it has an obviously substantial interest in the outcome of the instant proceedings, is not a party to the case and therefore has no independent right to apply for certiorari." This statement, however, may have failed to attach sufficient weight to the action of the court below on Local 1083's motion to intervene. Petitioner contends that the order of the court below had the effect of making it a party to the case, with the right of appeal. The order of the court below is ambiguous, and does not in terms show whether Local 1083 was granted leave to intervene as a party or as *amicus curiae*. If the order is interpreted as having the effect of making the Union an intervenor, its standing to petition for certiorari is clear. Cf., *International Union of Mine Workers* v. *Eagle-Picher Mining & Smelting Co.*, 325 U. S. 335, 338-339.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*), are as follows:

UNFAIR LABOR PRACTICES

Sec. 8. (a) It shall be an unfair labor practice for an employer—

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

REPRESENTATIVES AND ELECTIONS

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for

collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9 (a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * *

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such inves-

tigation shall be included in the transcript of the entire record required to be filed under section 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10 * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in queston occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such tem-

porary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

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IN THE

Supreme Court of the United States

October Term, 1954

No. 143

KEARNEY-TRECKER EMPLOYEES LOCAL 1083, INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, CIO, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD AND KEARNEY & TRECKER CORPORATION, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE RESPONDENT KEARNEY & TRECKER IN OPPOSITION [1]

OPINIONS BELOW

The opinion of the Court below (R. II, 25-137) [2] is reported at 210 F. 2d 852. The findings of fact, conclusions

[1] The Petition for a Writ of Certiorari was erroneously styled Kearney & Trecker Corporation, Petitioner, vs. National Labor Relations Board, Respondent, whereas the Petition was filed by Kearney-Trecker Employees Local 1083, International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, CIO, and not by the National Labor Relations Board.

[2] References to the Transcript of Record which is in two volumes consisting of the appendices of the Petitioner below and of the Board will be identified by the symbols "R.I" and "R.II"., respectively.

of law and order of the National Labor Relations Board (R. I-267-272) are reported at 101 NLRB 1577, adopting as modified the Trial Examiner's Intermediate Report (R.I-220-256).

JURISDICTION

The decree of the Court below was entered on February 26, 1954 (R.II-136-137). The petition for a writ of certiorari was filed on June 16, 1954, by Kearney-Trecker Employees Local 1083, International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, CIO, Petitioner, herein called Local #1083 or the UAW. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act as amended (61 Stat. 136, 29 U.S.C., Supp. V, 151. *et seq.*) and of the United States Code (62 Stat. 869, *et seq.*) are set forth in the Appendix, infra, pp. 17 and 18.

QUESTIONS PRESENTED

I

Whether the petitioner, Local # 1083, has status to file a petition for a writ of certiorari in this matter, since it is not a party within the meaning of 28 U.S.C. Section 1254(1) and the proceeding in the Court of Appeals was a matter against the United States Government, which alone is a proper party to appeal from the decision below in its obligation to protect the public interest.

II

Whether the decision of the Court of Appeals has decided an important question of Federal law which has not been settled by this Court or which is in conflict with the applicable decisions of this Court or of another Court of Appeals on the same matter.

STATEMENT

Upon petition of Kearney & Trecker Corporation for review of an order of the National Labor Relations Board, herein called the Board, the Court below issued a decree dismissing the Board's order which had directed Kearney & Trecker Corporation, the respondent in the proceeding before the Board, herein variously referred to as the employer or the respondent, to bargain collectively with Local #1083 of United Automobile, Aircraft & Agricultural Implement Workers of America, CIO, the petitioner herein, which had filed the charges and initiated the proceeding before the Board. The Board's order directing Kearney & Trecker to bargain collectively with Local #1083 was based in turn upon a certification of that organization as bargaining representative of the employees of Kearney & Trecker Corporation in Case No. 13-RC-1900, reported in 95 NLRB 1125 and 96 NLRB 1214. In those cases the National Labor Relations Board had refused to find, as Kearney & Trecker contended, that a contract between the respondent employer and Employees' Independent Union, affiliated with Confederated Unions of America, herein called the EIU, executed on July 2, 1950, for a duration of two years, was a bar to a new election under the Board's so-called "contract bar policy".

The Board rejected the employer's contention that this contract constituted a bar to a new determination of representatives, relying on its so-called "schism" doctrine under which the Board has refused to apply its "contract bar" rule where it finds that

> "the employees in the contract unit by some formal concerted action have unequivocally and effectively disaffiliated themselves from the contracting union. The Board recently declared that this exception to the contract bar rule will be narrowly applied, to prevent it from becoming a means of circumventing that rule, or being used merely for the purpose of 'facilitating a raid by a rival union during a contract's term, or permitting a group of dissident members to express

> their dissatisfaction with the bargain made by the representative holding the contract. ' ''. (Seventeenth Annual Report of the National Labor Relations Board... 1953, p. 47).

The Board refused to apply its "contract bar" doctrine. It found that because at a rigged EIU meeting (announced for a different purpose) at which an unrepresentative number of employees, many of whom were dissident officers of the EIU who had gone over to the UAW, voted to affiliate with that Union, there was created such confusion in the bargaining relationship that the contract could no longer be said to promote stability in labor relations. The Board also refused to find, as contended by the respondent, that by seizing the funds and properties of the EIU, by taking possession of its remunerative commissary, by threatening the employees with the denial of sickness and death benefits unless they supported Local #1083, and by publishing an abbreviated and therefore deceptive version of the Board's Decision and Direction of Election, the Petitioner herein, Local #1083, had engaged in such fraud and coercion as to make it impossible for the election to reflect the true wishes of the employees. The Court of Appeals for the Seventh Circuit placed its decision on the contention that the objections of the employer to the election should have been sustained, saying:

> "While we think there is merit in the company's contention that EIU was the sole organization which was or should have been recognized by the company, we are not persuaded that the Board's action on this score was not within its discretion." (R.II-132)

However, in reviewing the evidence, as was its obligation under the standards set down by this Supreme Court in the *Universal Camera* and *Pittsburgh Steamship* cases,[3] the Court of Appeals held:

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[3] *Universal Camera Corp.*, v. *N.L.R.B.*, 340 U.S. 474; *N.L.R.B.* v. *Pittsburgh Steamship Co.*, 340 U.S. 498.

> "A more important reason, in our judgment, why an election should not have been called or, in any event, why the Board should have refused to certify the results of an election, stems from the fact that Local 1083, pretending to act as a successor to EIU, seized all the property, money, books and records of EIU and deprived its members of all access thereto or benefits therefrom." (R.II-132).

The Court went on to say, as to the litigation concerning the proper ownership of the funds in the State courts:

> "With that litigation we need not be concerned, certainly we do not intend to prejudge it. We are, however, confronted with the question as to the effect which possession and control by Local 1083 was reasonably calculated to have upon employees participating in an election." (R.II-133).

It then recited that the fund created from profits for the conduct of the Company's commissary (which profits were used to provide sick and death benefits for members of the EIU, and held by the treasurer of the EIU, who, together with its other officers went over to Local #1083) was seized by Local #1083, which refused to honor sick benefit claims from members of the EIU unless and until they affiliated with Local #1083. The Court stated that the fact that litigation was pending in the State court relative to these funds furnished no reason why the Board should not have considered and determined what effect, if any, their possession, control and use by Local #1083 was reasonably calculated to have upon the election. It concluded:

> "A more fruitful means of exerting pressure upon members of EIU to desert that organization and align themselves with Local 1083 can hardly be imagined. It was coercion, open, direct and no doubt effective. It was such that EIU had two strikes on it before the election was called." (R.II-134).

The Court further stated:

> "Whether we view this situation as invalidating the Decision and Direction of Election or as impairing the result is of little consequence because either way it is viewed, the same result is reached. Obviously, the result cannot stand if the election was improperly called and neither can it stand if the election was conducted under circumstances which precluded a fair choice by the employees. It is possible that an election might have been propertly directed and held if the Board had made provision prior to the election for the elimination of the basis upon which Local 1083 was enabled to exert pressure and coercion upon the employees. As shown, however, no attempt was made by the Board to do so; in fact, the advantage which Local 1083 had obtained by its questionable tactics was ignored." (R.II-134).

The Court held that, in addition, Local 1083 committed another act which made the election incapable of reflecting the true choice of the employees by its misrepresentation and improper use of the Board's Decision and Direction of Election, reciting as to this:

> "Certainly, however, the use of the Board's decision in this matter was improper and when considered in connection with the situation previously discussed, we think it could well have affected the result of the election. It would seem certain that such was the purpose; otherwise, why was it not circulated until the evening before the election, when there was no opportunity to reply?" (R.II-135).

The Court concluded:

> "The minimum weight which can be given to this incident is that it is a further indication of the intention of Local 1083 to win the election by means foul or fair.
>
> "Other incidents are called to our attention which the company asserts show a pattern or course of conduct on the part of Local 1083 to coerce and intimidate those who persisted in their affiliation with EIU or

who refused to join Local 1083. In view of what we have said and the conclusion we have reached, we see no occasion to discuss the situation further. Our study of this record leaves us with the firm conviction that Local 1083 was conceived under a heavy cloud of suspicion and that its conduct was such as to preclude the inalienable right of the employees to select their bargaining representative in an election free from coercion and intimidation. In our judgment, the result of the election should not have been acquiesced in by the Board, and it should have refused to certify Local 1083 as the bargaining representative." (R.II-135-136)

ARGUMENT

I. The Petitioner, Local #1083, is not Entitled to File a Petition Under the Statute and its Petition is untimely

1. The petitioner, Local #1083, is not a proper party to petition for certiorari. The proceeding before the Court below was initiated by Kearney & Trecker Corporation pursuant to Section 10(f) of the Labor Management Relations Act (29 U.S.C., Supp. V., 151, *et seq.*) (61 Stat. 136) to review an adverse decision of the Board. The parties in that proceeding were *Kearney & Trecker Corporation,* Petitioner v. *National Labor Relations Board,* Respondent. During the pendency of this case before the Court of Appeals for the Seventh Circuit, Local #1083, which had filed the charge initiating the proceeding before the Board, filed briefs with the Clerk and then filed a motion to intervene, wherein it moved the Court "for leave to intervene in the above cause for the purpose of filing briefs now on deposit with the clerk of this Court, and for permission to argue said cause". The Government took no formal position in regard to this motion. Kearney & Trecker Corporation, Petitioner below, filed an answer in which it stressed that this was a public proceeding in the public interest in which the Board had the sole and exclusive right to present the position of the Government and that it would adequately do so. The answer also called the Court's attention to the fact that, under the doctrine set forth by that Court in the

Aluminum Ore case,[4] the Court had said it would permit charging parties to participate before it in proceedings involving the review of Board orders only where it appeared that such parties could contribute to the information and enlightenment of the Court. In that case the Court had said:

> "In such proceedings, private parties have no rightful place except as the Court may desire to avail itself of helpful suggestions." (p. 488).

Petitioner below took the position that nothing in the motion for intervention indicated that the Local #1083's presence was necessary to perform such a service and that therefore the Court should apply its customary doctrine in acting on the motion.

On September 14, 1953, the Court of Appeals granted the motion of Local #1083 to intervene "for the purpose of filing the Briefs now on deposit" and denied "that part of said motion which seeks leave to said counsel to participate in oral argument of this cause". This same Court has defined *amicus curiae* as a party "whose sole function is to advise or make suggestions to the Court" (*Clark* v. *Sandusky*, 205 F. 2d 915 (C.A. 7) at p. 917. This definition coincides almost identically with the standards which a charging union would have to meet to be permitted to participate in a Board case under the *Aluminum Ore* case. Clearly, the most that could be said for the status of Local #1083 before the Court of Appeals was that it was permitted to file briefs in the capacity of an *amicus curiae* and not as a full party intervenor.

The statute (28 U.S.C. § 1254) provides that cases in the Court of Appeals may be reviewed by the Supreme Court among other means "By Writ of Certiorari granted upon a petition *of any party* to any civil or criminal case before or after rendition of judgment or decree . . .". [Emphasis supplied] The status of the would-be petitioner in

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[4] *Aluminum Ore Company* v. *N.L.R.B.*, 131 F. 2d 485 (C.A. 7).

this matter is well described in the "Application For An Extension Of Time Within Which to File A Petition For A Writ Of Certiorari" in this matter filed with the Court on May 27, 1954, by Robert L. Stern, Acting Solicitor General. On page 2 of that application the following allegation is contained:

> "On May 7, 1954, the National Labor Relations Board requested the Solicitor General to file a petition for certiorari to review the decision of the Court of Appeals in this case. On May 19, 1954, the Solicitor General advised the Board that, after consideration of the matter, it had been concluded that further review of the case by the Supreme Court should not be sought. The United Automobile, Aircraft & Agricultural Implement Workers of America, CIO, although it has an obviously substantial interest in the outcome of the instant proceedings, *is not a party to the case and therefore has no independent right to* apply for certiorari . . .". [Emphasis supplied]

Since Local #1083 was not a party below, it has no status under 28 U.S.C. § 1254 to petition this Court for a writ of certiorari.

2. Proceedings before the Board are in the public interest, and for the application of public, not private rights. *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261; *National Licorice Co.* v. *N.L.R.B.*, 309 U.S. 350, 362; *Garner et al* v. *Teamsters*, 346 U.S. 485. Thus, "the person or group making the charges does not become the actor in the proceedings." *Amalgamated Utilities* at p. 265. This is because:

> ". . . it is apparent that Congress has entrusted to the Board exclusively the prosecution of the proceeding by its own complaint, the conduct of the hearing, the adjudication and the granting of appropriate relief. The Board as a public agency acting in the public interest, not any private person or group, not any employee or group of employees, is chosen as the instrument to assure protection from the described unfair conduct in order to remove obstructions to interstate commerce."

The Court, therefore, "has no jurisdiction to enforce the order at the suit of any private person or persons" (*Amalgamated* case at p. 270).

The National Labor Relations Board has consistently and successfully maintained that it alone may control litigation under the Act. See, i.e., *Amalgamated Utility Workers* case; *N.L.R.B.* v. *Thompson Products, Inc.*, 133 F. 2d 637 (C.A. 9).

In successfully resisting intervention by a charging party, except on an *amicus* basis, in a case before the Court of Appeals for the Second Circuit last term, the Board in a memorandum filed therein said:

> "The proceeding herein is a public proceeding in vindication of public rights and the charging union does not have the kind of interest which would entitle it to status as a party. See *Amalgamated Utilities Workers* v. *Consolidated Edison Co.*, 309 U.S. 261, and *Aluminum Ore Co.*, v. *N.L.R.B.*, 131 F. 2d, 485, 488 (C.A. 7). The Board, as a matter of policy, draws a distinction between a case where the order and the review is one where the Board sustained the complaint and the proposed intervenor was the charging party before the Board, whose only interest is that he stands to benefit by enforcement of the order, and, a case where the order under review is one where the Board dismissed the complaint and the proposed intervenor was the respondent before the Board, who, if the Board's order of dismissal were reversed, would thus be subjected to a liability. The Board views the latter kind of interest as the only one which warrants intervention. The Courts have drawn the same distinction. Compare *Aluminum Ore Co.*, v. *N.L.R.B.*, *supra*, with *Albrecht* v. *N.L.R.B.*, 181 F. 2d 654 (C.A. 7), and *A.N.P.A.* v. *N.L.R.B.*, 190 F. 2d 45 (C.A. 7). The nature of the interest of the proposed intervenor here is the former rather than the latter, and, accordingly, we believe its motion for leave to intervene should be denied". (Opposition of the National Labor Relations Board to proposed intervention, *National Labor Relations Board*, Petitioner v. *Otis Elevator Company* Respondent, United States Court of Appeals for the Sec-

ond Circuit, No. 28, October Term, 1953, Docket No. 22-727); Order (unreported) October 6, 1953; enforced as modified 208 F. 2d 176.

It took the same position successfully before the Court of Appeals for the District of Columbia in *Brewery and Beverage Drivers and Workers, Local Union No. 67* v. *N.L.R.B.*, C.A.D. No. 12,115, Order (unreported) June 4, 1954. In that case the charging party, an employer, sought to intervene after the union, which had been respondent before the Board, had petitioned the Court to review the Board's Order. The Circuit Courts have uniformly refused to permit charging parties to intervene where the issue has been raised. [5]

The reasons which have led to this conclusion are equally applicable here, where a union not a party to litigation in a circuit court seeks to remove from the Government's control its right to determine whether it serves the public interest to seek review of unsuccessful litigation. This is not like a situation where the Board has dismissed a charge, in whole or in part, and the charging party may thus be a "person aggrieved" within the meaning of Section 10(f) of the Act. Here the Government has chosen not to seek review of unsuccessful litigation, and a private party seeks to assert alleged private rights, even though it was not a party before the Court of Appeals. [6]

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[5] *Aluminum Ore and Otis* cases, *supra; Stewart Die Casting* v. *N.L.R.B.*, 132 F. 2d 801 (C.A. 7). This Court has likewise refused to permit intervention by a respondent employer where a petition to review a dismissal of a complaint was initiated by the charging party. *N.L.R.B.* v. *Local Union No. 1229*, 345 U.S. 947. See also *Haleston Drug Stores, Inc.*, v. *N.L.R.B.*, 190 F. 2d 1022 (C.A. 9).

[6] This situation differs greatly from that which existed in *International Union of Mine Workers* v. *Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335. There the Supreme Court concluded that "under the circumstances disclosed, the petitioners, [the charging party before the Board], though they could not have instituted enforcement proceedings, [citing cases] had standing to seek review of the order denying the Board's petition". However, that case is clearly distinguishable for the following reasons: (1) The petition-

3. Furthermore, Local 1083's petition was not timely filed on June 16, 1954. Judgment was entered on February 26, 1954 (R.II-136-137). Local #1083 made no request for an extension of time within which to file its petition; Mr. Justice Reed granted the extension of time within which the Government could petition "upon consideration of the application of counsel for petitioner" (R.II-155) on the express representation of the Solicitor General that Local #1083 was "not a party to the case and therefore has no independent right to apply for certiorari". We submit that Local #1083's petition was, in any event, untimely, since it was not filed within ninety days after the entry of the judgment of the Court below, as required by 28 U.S.C. § 2101 (c).

II. The Decision of the Court Below Presents No Question to Warrant Certiorari

The petition fails utterly to show that the Decision of the Court of Appeals justifies review by this Court. No conflicting decision of this or any Circuit Court is shown. A summary comparison of the petition with the decision be-

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ing union had been permitted to intervene as a party both in the original proceedings for the review of the Board's Order before the Circuit Court and in the supplemental proceedings before that Court whereby the Board sought to have the provisions of the decree entered set aside and the case remanded to it because of an error in the formula adopted for computing back pay to individual employees. This was the sole issue which was presented to the Supreme Court on the petition for a writ of certiorari. (2) The issue thus brought up to the Court was whether the Board's error was so material as to affect substantially the back-pay rights of the employees which the union therein represented. (3) Thus, as in a § 10(f) proceeding, an opportunity was given a party aggrieved by a final order of the Board which had been denied in part the relief sought. Under such circumstances, as in *Consolidated Edison Company of N. Y., Inc.*, v. *N.L.R.B.*, 305 U.S. 197, "an opportunity [was] afforded to *contest* a final order of the Board, not to *enforce* it" a distinction stressed by this Court in denying a charging union the right to initiate contempt proceedings in the *Amalgamated Utilities* case (p. 266). Here the only issue is the validity of the Board's certification, a matter peculiarly under its protection in the public interest.

low reveals that no important and unsettled question of federal law is presented. It involves nothing more than a determination of the adequacy of evidence on the particular factual issues presented by this case. The decision below is based solely upon the review of the record by the Court of Appeals to determine whether the Board's order was supported by substantial evidence on the record as a whole and would effectuate the policies of the Act. This case does not involve an issue as to the Board's resolution of credibility issues. The Court accepts its subsidiary findings, and concludes that the Board erred, on the basis of those findings, and on the record taken as a whole, in concluding that the election on which it based its Order could have reflected the true wishes of the employees because of the effect thereon of the coercive and intimidatory conduct of Local #1083 set forth in the record. The Court below did not, as the petition erroneously alleges, ground its decision on unlitigated issues, invade the jurisdiction of cases pending in the State court, hold it the duty of the Board to determine issues involved in internal union controversy, substitute its judgment for the Board's, or invade the area of the Board's discretion. Hence the cases cited by the Petition (p. 4, para. 1) are not in point. The Court merely reviewed and found lacking in substantial record evidence the conclusion of the Board, contrary to the contention of the employer, that the conduct of Local #1083 in (1) seizing control of the EIU by unconstitutional means, (2) seizing its funds and offices and the Company commissary—the principal source of income for the EIU, (3) threatening supporters of the EIU with deprivation of their accrued benefits under the welfare plan, (4) falsely misusing the Board's decision, as well as (5) making miscellaneous threats to individuals, permitted the results of the election to reflect the true wishes of the voters on the basis of the standards established throughout the years by the Board. This review was precisely within the area determined by the Court to be the obligation of the Court of Appeals in the *Universal Camera* and *Pittsburgh Steamship* cases,

supra. This Court clearly indicated that, especially in cases which involve, as does the instant case, an employer's duty to bargain with a union, the Court of Appeals must perform its duty to determine, on the record, the propriety of the Board's order, and that this Court will not review such a determination *ab initio* as the petition here requests, when it stated:

> "Last term we made it plain that Congress charged the Courts of Appeal, not this Court, with the normal and primary responsibility for reviewing the conclusions of the Board. We stated that this Court 'is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way.' "[7]

The decisions of this Court which the petition alleges to be in conflict with the decision of the Court below all predate the 1947 amendments of the Labor Management Relations Act and the Administrative Procedure Act, which this Court held in the *Universal Camera* and *Pittsburgh Steamship* cases altered the scope of review of the Court of Appeals. But even under the standards of the earlier cases there is no conflict, as noted *supra.*

The Courts of Appeal cases cited by the Petition (p. 4., para. 2) involve very different factual situations and are not in point. Indeed, there can be no conflict between cases such as those cited and the instant case, since, where, as here, there is no issue of law presented, whether the record evidence justifies the Court in refusing to find an election fair and uninfluenced must be decided on the unique facts of the particular case. As to the alleged conflict with Board policy, it is to be noted that the Trial Examiner himself recites in his Intermediate Report that "a number of recent Board decisions dealing with schism

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[7] *N.L.R.B.* v. *American National Insurance Co.,* 343 U.S. 395, 409-410.

cases indicate a more restrictive application by the Board of this doctrine" (R. 232-233). In any case the Board's schism doctrine is not in issue since the Court did not base its decision on that question.

The Petition's allegations which seek to establish the importance of the question it claims is raised by the Decision of the Court below are based on the false contention that that Court held that the Board, in cases where one union seeks to succeed another, must determine the property right of the competing unions. The Court of Appeals merely concluded that the record before it did not sustain by substantial evidence any conclusion but that the whole course of conduct of Local #1083, "was conceived under a heavy cloud of suspicion", which the Court held "was such as to preclude the inalienable right of employees to select their bargaining representative in an election free from coercion and intimidation". As one of the factors revealed by the record, which led it to this conclusion, the Court below referred to the seizure of the funds of the EIU by Local #1083. It pointed out:

> "The fact that litigation was pending in the State court relative to these funds furnishes no reason why the Board should not have considered and determined what effect, if any, their possession, control and use by Local 1083 was reasonably calculated to have upon an election". (R.II-133).

This is very different from holding, as the petition alleges, "that the National Labor Relations Board in a representation hearing must hear and determine issues including title to property" (Pet., p. 5., para. 4). All the dire results which the petitioner alleges would flow from the Court's decision are based upon the erroneous recital of what that decision holds. The Board cases recited by the petition (p. 6, para. 4) as embracing the same issue do not involve the Board's erroneous resolution of objections to the conduct of an election, the specific ground on which the Court below found the Board's decision to be without foundation in the record.

CONCLUSION

The petitioner has no status to file the petition and the decision of the Court below is plainly correct and presents neither a conflict of decisions nor any question warranting review. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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APPENDIX

The relevant provisions of Title 28 of the United States Code (62 Stat. 869, *et seq.*) are as follows:

SEC. 1254. COURTS OF APPEALS; CERTIORARI; APPEAL; CERTIFIED QUESTIONS

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

* * * * *

SEC. 2101. SUPREME COURT; TIME FOR APPEAL OR CERTIORARI; DOCKETING; STAY

* * * * *

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, 151, *et seq.*), are as follows:

UNFAIR LABOR PRACTICES

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7:

* * *

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

* * * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

* * * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States circuit court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. * * * the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

SEP 20 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 143

KEARNEY-TRECKER EMPLOYEES LOCAL 1083, INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, CIO, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD AND KEARNEY & TRECKER CORPORATION, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

SUPPLEMENTAL BRIEF IN OPPOSITION FOR RESPONDENT KEARNEY & TRECKER

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SUPPLEMENTAL BRIEF IN OPPOSITION FOR RESPONDENT KEARNEY & TRECKER

In opposition to the recitals of the Respondent National Labor Relations Board in its "Memorandum", which, as Respondent Kearney & Trecker Corporation reads it, supports the petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit, Respondent Kearney & Trecker Corporation respectfully represents:

1. The decision of the Court below does not turn upon the propriety of the Board's practice of applying its "schism" doctrine as an exception to its "contract-bar" rule in directing elections to determine employee representation.

There were just two contentions made to the Court of Appeals: Whether the facts as revealed by the record taken as a whole within the scope of review as set forth in the *Universal Camera*[1] and *Pittsburgh Steamship*[2] cases, justified and supported (1) the Board's Direction of Election on the basis of its so-called "schism" doctrine and (2) the Board's determination that the conduct of the election in fact permitted a fair, free, and impartial choice of a bargaining representative by the employees.

The Court refused to adopt the employer's contention on the first issue. It carefully pointed out, contrary to the inferences throughout the Board's "Memorandum":

> "It is asserted that the Board refused to follow its own decision in holding that a schism existed in the instant situation which justified it in ignoring its contract bar policy. The policy thus stated as well as the exceptions thereto are solely of the Board's creation and we see no reason why the Board cannot reasonably expand or restrict this policy as it sees fit. While we think there is merit in the company's contention that EIU was the sole organization which was or should have been recognized by the company, *we are not persuaded that the Board's action on this score was not within its discretion.*" (Decision, page 7; R. II-132.) [Emphasis supplied.]

Thus, the Court meticulously noted that its refusal to enforce the Board's order was not founded upon the Board's invocation of its schism doctrine but, as noted later in the decision, was based upon the Court's conclusion that the record considered as a whole did not support

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[1] *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474.

[2] *N.L.R.B.* v. *Pittsburgh Steamship Corp.*, 340 U.S. 498.

the Board's finding that the election fairly reflected the wishes of the employees (Decision, page 8; R. II-132). This conclusion of the Court, in turn, was based upon the Board's failure to give adequate, if any, weight to the conduct of Petitioner in seizing the funds and properties of the E.I.U. (the competing union on the ballot) and in refusing to honor sick benefit claims from members of the E.I.U. unless and until they affiliated with Petitioner. The Court observed as to these matters that the Board treated them "with scant consideration" (Decision, pages 8-9; R. II-132). Moreover, the Court found that the improper and deceptive use made by Petitioner of the Board's Decision and Direction of Election, just prior to the election, "could well have affected the result of the election" (Decision, page 10; R. II-135).

In this regard, the "Memorandum for the National Labor Relations Board" concedes (page 16):

> "It is not clear, however, that the questions stated in the petition for certiorari are presented by the decision of the court below. Thus, the court's holding with respect to the question of successorship and ownership of union property may be susceptible of being interpreted not to turn upon Local 1083's entitlement to union assets, but *upon its coercive utilization of such assets to influence the election results*, regardless of the question of their ownership." [Emphasis supplied].

However, this document infers throughout that property rights have been put in issue by the Court. On the contrary, the Court did not hold that the Board should have resolved the issue of ownership pending before the State court. The Court expressly said, "With that litigation we need not be concerned, certainly we do not intend to prejudge it."[3] (Decision, page 8; R. II-133). But that litiga-

[3] The cases cited by the Board (Memorandum, page 13) as to the immateriality of property rights as between unions relate to contract-bar issues which are not here involved.

tion did not, the Court held, preclude the Board from discharging its obligation to evaluate the whole record, including the matters relating to the seizure of funds and deprivation of benefits, and from making factual findings which would stand up when weighed against the record taken as a whole. The Court further held that the Board could not disregard this record evidence in determining the validity of the election (R. II-132).

2. The relative scope of judicial review in a representation proceeding, as opposed to that in an unfair labor practice proceeding, is not in issue. Here, again, the Board concedes:

> "Similarly, in view of the court's silence with respect to the standard of review it applied to the Board's decision, it is not clear that the court disregarded the proper weight which must be attached to the Board's findings in election cases." (Memorandum, page 16.)

However, the Board infers the contrary (Memorandum, page 15, paragraph 2).[4] If this matter were in issue, Respondent Kearney & Trecker would be obliged to contend that all findings essential to sustaining a violation of Section 8 (a) (5) of the Act must be supported by the quantum of evidence set forth by this Court in the cases cited in our Brief in Opposition. However, it is plain that the Board's finding that the election clearly and fairly reflected the free choice of the employees—a conclusion which the Court held unsupported—was based on issues litigated in the unfair labor practice case, and not merely incorporated from the preceding representation case. (See B.A. 235-241).

3. The Court below, in rejecting the finding of the National Labor Relations Board that the conduct of Local

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[4] It is to be noted that the cases cited in the body of the Board's Memorandum, at pages 15-16, all *pre-date* the *Universal Camera* and *Pittsburgh Steamship* cases, *supra*, and *N.L.R.B.* v. *American National Insurance Company*, 343 U.S. 395.

1083 did not constitute such coercion as to invalidate the election, properly based its review upon the standards set forth by this Court in the *Universal Camera* and *Pittsburgh Steamship* cases.

The fact that the Court failed to use castigatory language in referring to the Board's decision does not mean that the Court was not applying the standards of review set forth by this Court in the *Universal Camera* and *Pittsburgh Steamship* cases. It is apparent that the Court held that the Board had based its conclusions of fact and of law on findings which were not supported by the record as a whole, in accordance with the standards set forth in those cases. For example, the Court stated in its decision (page 2; R. II-126):

> "We have accorded a great deal of study to the voluminous record before us but, in view of the conclusion which we have reached, we think that a relatively brief statement of the facts will suffice."

Again, the Court stated:

> "The Board, however, treats this matter [the seizure by Local 1083 of the E.I.U.'s property, money, books, and records and the deprivation of its members of access thereto or benefits therefrom] with scant consideration and in its Decision and Direction of Election refers to it only in the following statement: 'The E.I.U. further contends that it would be inequitable to hold an election while Local 1083 is still holding funds belonging to the E.I.U. As noted above, however, the question of the ownership of these funds is now pending before the courts. We are not convinced that an election should be delayed pending its determination.'" (Page 8; R. II-132).

Further along in its decision, the Court said:

> "It appears that the Board overlooked the wholesome principle enunciated in its decision in *The Matter of General Shoe Corporation*, 77 N.L.R.B. 124, as follows (page 127): 'In election proceedings, it is the Board's

> function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. It is our duty to establish those conditions; it is also our duty to determine whether they have been fulfilled.' " (Page 10, R. II-134).

It is plain that the Court has concluded, applying the standards of review set forth in the *Pittsburgh Steamship* and *Universal Camera* cases, that the Board improperly disregarded important parts of the record before it in determining that the election held in the instant case constituted a valid election. This Court of Appeals was well aware of its obligations in reviewing decisions of the National Labor Relations Board. See *Whiting Corporation* v. *N.L.R.B.*, 200 F. 2d 43 (C.A. 7), decided January 2, 1952. In that case, the same Court held, in reviewing and setting aside a refusal to bargain order of the Board which turned upon the validity of the Board's determinations in a representation case prior to the unfair labor practice proceeding brought under Section 8 (a) (5) of the Act:

> "If, upon the scrutiny of the record prescribed by the Act and discussed in *N.L.R.B.* v. *Universal Camera Corp.*, 340 U.S. 474, we find that the evidence does not adequately support the Board's finding in this respect, then the union was not the employees' representative for collective bargaining and the order declaring petitioner guilty of an unfair labor practice in failing to negotiate with it must fall.
>
> "The Supreme Court, in *N.L.R.B.* v. *Universal Camera Corp., supra*, has defined the nature of our review under the present law as follows: ' * * * Congress has left no room for doubt as to the kind of scrutiny which a court of appeals must give the record before the Board to satisfy itself that the Board's order rests on adequate proof. * * * Courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate

> the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable bound.' Consequently, in resolving this specific question of fact, in order to ascertain whether it 'rests on adequate proof,' it has been necessary to examine in detail those parts of the record submitted to us by the respective parties, bearing upon the question."

Although the Court did not feel obliged, at this late stage of the game, to set forth specifically in the instant matter the measure of review by which it tested the Board's decision, it is important to observe that the Court said, "We have accorded a great deal of study to the voluminous record before us . . ." (Decision, page 2; R. II-126). Moreover, in setting forth the basis for its conclusion that the Board's findings were not supported by substantial evidence on the record taken as a whole, the Court noted, as pointed out in excerpts quoted from its decision, *supra*, that the Board treated "with scant consideration" the issues arising from Local 1083's seizure of all the property, money, books, and records of the E.I.U. and deprivation of the latter's members of all access thereto or benefits therefrom (Decision, page 8; R. II-132). The Court further observed, in this regard, that the "Board overlooked the wholesome principle enunciated in its decision in *The Matter of General Shoe Corporation*," wherein the Board enunciated its standards for the conduct of elections and elaborated upon its functions in election proceedings (Decision, page 10; R. II-134). Finally, in setting forth its standards of review, the Court below stated (Decision, page 11; R. II-136):

> "In our judgment, the result of the election should not have been acquiesced in by the Board, and it should have refused to certify Local 1083 as bargaining representative."

Taken as a whole, these comments of the Court of Appeals clearly demonstrate that it concluded that the findings of the Board did not meet the standards as set forth in the *Universal Camera* and *Pittsburgh Steamship* cases. It would be ridiculous if the Court below were required either to use castigatory and condemnatory language as to the inadequacy of the Board's findings or be subject to the charge that it "did not intimate that the Board acted arbitrarily or capriciously," as is contended in the "Memorandum" (page 14). Such, indeed, are not the requirements of those cases. This Court has expressly said that in cases involving a violation of Section 8 (a) (5) of the Act the standards set forth in the *Universal Camera* and *Pittsburgh Steamship* cases are to be applied. See *N.L.R.B.* v. *American National Insurance Company*, 343 U.S. 395.

In conclusion, we submit that the so-called "Memorandum" of the National Labor Relations Board, which, in effect, attempts to sustain[5] Local 1083's Petition for a Writ of Certiorari, notwithstanding the Board's admitted doubt that the questions presented thereby are in issue, is in error since (1) the propriety of the "schism" doctrine of the National Labor Relations Board as an exception to its "contract bar" doctrine is not in issue in this proceeding, (2) no issue is raised herein as to the relative scope of judicial review in a representation proceeding, as opposed to that in an unfair labor practice proceeding, and (3) the standards of review of the Court below were based upon those enunciated by this Court in the *Universal Camera* and *Pittsburgh Steamship* cases. Thus, we reiter-

[5] The Board's "Memorandum" appears to constitute an attempt to accomplish through the "back door" what was denied to the Board by the Solicitor General in the first instance: Supreme Court review of the Court of Appeals decision at the behest of the Board. Moreover, in the last paragraph of its "Memorandum" (pages 16-17) the Board, in effect, suggests that the Supreme Court itself should, in this case, perform the duties and functions vested in the Solicitor General by 5 U.S.C. § 309, i.e., to conduct and control the Government's suits in the Supreme Court of the United States.

ate that no question of importance is raised by the Petition for Certiorari.[6]

Wherefore, we urge this Court to deny the Petition for Certiorari filed in the above-entitled matter.

Respectfully submitted,

LAMFROM & PECK,
By LEON B. LAMFROM,
208 E. Wisconsin Ave.
Milwaukee, Wisconsin

and

DENHAM & HUMPHREY,
By HELEN F. HUMPHREY,
1025 Connecticut Ave., N.W.
Washington 6, D. C.

Attorneys for Respondent,
Kearney & Trecker Corporation

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[6] As noted in our Brief in Opposition (page 9), the Solicitor General alleged to this Court in his Application for an Extension of Time within which to File a Petition for a Writ of Certiorari that the decision of the Court below presented no question of importance which would justify a Petition for a Writ of Certiorari. The National Labor Relations Board also reported to counsel for Respondent Kearney & Trecker in a letter dated June 11, 1954, and set forth as Appendix A herein:

> "Now that the Solicitor General has made his final decision not to seek certiorari to review the Circuit Court's denial of enforcement of the Board's order in Case No. 13-CA-971, the Board has decided to proceed with the representation proceeding initiated by the filing of Local 1083's petition in Case No. 13-RC-3837."

Because of this determination, the Board has compelled Respondent Kearney & Trecker to engage in extensive litigation in Cases Nos. 13-RC-3837 and 3922, which have been in hearing since August 11, 1954, and in which the sole issue is the very question which the Petitioner asks this Court to determine in its Petition for Certiorari, to wit, whether Kearney-Trecker Employees Local 1083, International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, CIO, is indeed the statutory representative of these same employees of Respondent Kearney & Trecker. The pendency of this representation proceeding clearly shows that the propriety of the Circuit Court's rejection of the Petitioner's representative status cannot raise a question of great importance.

APPENDIX A

NATIONAL LABOR RELATIONS BOARD
Washington 25, D. C.

June 11, 1954

Robert N. Denham, Esquire
Denham & Humphrey
1025 Connecticut Avenue N. W.
Washington 6, D. C.

Re: Kearney & Trecker Corporation
and International Union,
UAW-CIO, Local 1083
Case No. 13-RC-3837

Dear Mr. Denham:

Now that the Solicitor General has made his final decision not to seek certiorari to review the Circuit Court's denial of enforcement of the Board's order in Case No. 13-CA-971, the Board has decided to proceed with the representation proceeding initiated by the filing of Local 1083's petition in Case No. 13-RC-3837.

The Board has deferred ruling at this time on the motion, contained in your letter of March 23, requesting the Board to issue a statement of policy as to certain conditions precedent to the processing of Local 1083's recent petition. The Board believes that the basic issues raised by your motion and by the Circuit Court's decision can be given proper consideration only upon a formal record duly made in normal course in Case No. 13-RC-3837 as to presently existing conditions bearing upon the question of whether a fair and free election may currently be held in the new proceeding.

You will, of course, be duly advised by the Board's agents of the further steps that will be taken in Case No. 13-RC-3837.

Sincerely,

FRANK M. KLEILER /s/
Frank M. Kleiler
Executive Secretary

cc: All Parties

APPENDIX B

The relevant provisions of Title 28 of the United States Code (45 Stat. 54, et seq.) are as follows:

> Conduct and argument of cases by Attorney General and Solicitor General.
>
> Except when the Attorney General in particular cases otherwise directs, the Attorney General and Solicitor General shall conduct and argue suits and appeals in the Supreme Court and suits in the Court of Claims in which the United States is interested, and the Attorney General may, whenever he deems it for the interest of the United States, either in person conduct and argue any case in any court of the United States in which the United States is interested, or may direct the Solicitor General or any officer of the Department of Justice to do so. (R.S. §359; Jan. 31, 1928, ch. 14, §1, 45 Stat. 54.)